Supreme Court, U.S.
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NO. 91-1144

IN THE SUPREME COURT OF THE
UNITED STATES

TERM

PETER N. STARR
Petitioner

VS.

THE CITY OF ALTOONA and ALAN R. MIKULA,
MAYOR,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE[1]

The Respondent, the City of Altoona, is a third class city in the Commonwealth of Pennsylvania. Pursuant to the applicable Third Class City Code, the Mayor of the City retained the full and final authority over the appointment and discharge of the Chief of Police and the direct responsibility for the Police Department. 43 Pa. C.S.A. §37002.

The Petitioner, Peter N. Starr, joined the Altoona Police Department in 1969 as a patrolman and was appointed to the position of Police Chief in 1984. The individual Respondent, Alan R. Mikula, assumed the post of Mayor of the City of Altoona in December, 1987. The Altoona Police Department historically suffered from severe morale problems which stemmed from a lack of communication among the officers. In November, 1988, the Mayor, as a result of continuing morale and communication problems with the Petitioner, issued a written Order demoting the Petitioner to his previous rank of Sergeant. Within hours after his demotion, the Petitioner was photographed by a local newspaper

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[1]The Respondent includes this Counterstatement of the Case to address certain perceived omissions and misstatements of fact in the Petition for Writ of Certiorari.

photographer cleaning out his desk. Later that same day, several City Council members spoke to the Mayor about his reasons for demoting the Petitioner and the procedure utilized by the Mayor in the demotion. Within his discretion, the Mayor thereafter issued an oral directive reinstating the Petitioner as Chief of Police.

Immediately after the Petitioner's reinstatement, the Mayor met with members of the media, at which time he indicated his continued dissatisfaction with the Petitioner and reaffirmed his intent to demote the Police Chief. The Mayor also made two comments questioning the Police Chief's integrity. These comments were never reported nor were similar comments made after November, 1988. The problems between the Petitioner and the Mayor persisted and were evident to members of the City Council, the employees of the Police Department and the Petitioner himself. In February, 1989, the Mayor prepared and circulated among City Council members a memorandum which outlined his problems with the Petitioner, but which did not include any allegations of corruption.

During the week prior to March 7, 1989, the Petitioner was informed by two sources that his demotion was imminent.

Although he did not report to work on March 6, 1989, the Petitioner called the office of the Mayor twice, once to inquire about the rumors of his demotion and a second time in which he threatened to have the Mayor arrested or to take him to Court for harassment. Soon after these telephone calls, the Petitioner received a directive, as set forth in Petitioner's Statement of the Case, prohibiting any contacts with the media. Along with this directive was a letter scheduling an appointment between the Petitioner and the Mayor for the next morning. This meeting was later cancelled by the Mayor with the understanding it was to be rescheduled.

On March 7, 1989, the Petitioner and his wife attended a scheduled meeting of the City Council. During a question and answer portion of the Council meeting, a reporter questioned the Mayor regarding the memorandum directing that the Petitioner not hold discussions with the media. After the Mayor declined to comment on the issue, the Petitioner's wife handed a copy of the memorandum to the reporter and the contents were read to those attending the meeting. At that point, the Mayor stated that the reading of the memorandum constituted insubordination and

asked to see the Petitioner in his office immediately after the Council meeting. The Petitioner returned to his office for approximately one-half hour after the meeting before leaving the building, but did not report to the Mayor's office as had been requested. At approximately 11:00 a.m. on March 7, the Petitioner received notice of his demotion to his previous position of Sergeant.

At a public meeting of City Council the next day, the Mayor declined to comment on the reasons for the Petitioner's demotion, except to say:

> "Quite frankly, I don't think it serves the public interest to air the police's dirty laundry in public. Obviously, there are problems, there have been problems for quite some time, I felt that change was needed to improve police service in Altoona, and I think you are going to see within the next few months that police service will improve, and so all I can say at this point and all I will say is, wait and see."

In response to a question about whether he felt he had little choice but to demote the Petitioner after the incident in Council chambers the previous morning, the Mayor stated, "Yes,

quite frankly, yes." The Mayor also indicated that he had intended to speak with the Petitioner privately and that the meeting would have been to discuss his list of problems with the Petitioner and the demotion. No public comments were made by the Mayor or any other representative of the City of Altoona at that time or any time thereafter which linked the demotion with any charges of corruption or any internal investigation of the police department.

On March 23, 1989, the Mayor issued a letter specifically removing the restrictions on Petitioner regarding discussions with the media which was set forth in the March 7 memorandum. The Petitioner returned to work with the Altoona Police Department for only a brief period of time before resigning. He thereafter secured a position with the Pennsylvania Crime Commission as an investigator.

Petitioner filed a Complaint with the United States District Court for the Western District of Pennsylvania on March 20, 1989 alleging a violation of his right to due process and his First Amendment rights as a result of his demotion from the office of Police Chief. Trial of this case was scheduled to begin on

January 14, 1991. Prior to the commencement of the trial, Respondents filed a Motion in Limine requesting the Court to preclude any evidence on the due process issue. Upon an oral Motion to Dismiss, the District Court dismissed Petitioner's due process claims on the grounds that he did not have an interest or status guaranteed to him by State Law or the Constitution protected by the due process clause of the Fourteenth Amendment. After the close of the Petitioner's case in chief on January 17, 1991, the District Court granted Respondent's Motion for a Directed Verdict as to all the remaining claims.

The Petitioner contends that he had raised two distinct First Amendment claims and that the District Court failed to acknowledge or address the Petitioner's First Amendment claims except as they related to the demotion. However, one day after the grant of the Motion for Directed Verdict, the District Court amended its Memorandum Opinion to address this specific issue. (See Appendix B, infra. p. 1a). The District Court found that the Petitioner had neither raised nor tried the issue of a First Amendment violation separate and apart from the demotion. In addition, the District Court found that even if this issue had been raised, the Petitioner failed to present testimony sufficient to support the claim.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SECTION I

THE PETITIONER'S DUE PROCESS CLAIM WAS PROPERLY DISMISSED IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The Petitioner raised an issue of procedural due process on the basis of a perceived "liberty" interest. In support of this argument, the Petitioner characterizes his case as that of an at-will public employee "accused of corruption" and then demoted. This characterization is flawed at best. Because the Petition for Writ of Certiorari asserts that the lower courts improperly decided the Petitioner's due process claim, it is necessary to address those misstatements which may have a bearing on the question of whether the issue could properly be before the Court if certiorari is granted.

It is acknowledged that the Petitioner is an at will public employee, and as such, is not afforded a property interest in his former position as Chief of Police for the City of Altoona. It

is also true that the Petitioner was demoted on March, 1989 from the position of Police Chief to that of Sergeant, the position he had previously held. However, the Petitioner's Complaint does not allege, and there is no basis in the record to support the finding, that the Petitioner's demotion was the result of a public charge of corruption. Because there is no support in the record for this contention, certiorari may not properly be granted on this issue.

In the seminal case of Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), this Court recognized that a government employee's liberty interest may be implicated where the government dismisses him based on charges "that might seriously damage his standing and associations in the community" or that might impose "on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." However, this Court has declined to extend the protections of the Due Process Clause of the 14th Amendment in that case to a situation involving the termination of an at-will public employee where there was no public disclosure of the reasons for the discharge. In Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), the police officer's termination was not found to implicate any liberty

interest where the charges giving rise to the discharge were not publicized other than to orally communicate them to the police officer privately and later provide the reasons in response to the subsequent litigation instituted by the officer. The truth or falsity of the underlying charges was deemed to be irrelevant if they were not publicized. This Court noted "a contrary evaluation. . . would enable every discharged employee to assert a constitutional claim merely be alleging that. . . the supervisor made a mistake. The Federal Court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Id. 426 U.S. at 349, 96 S.Ct. at 2080.

This interpretation has been consistently followed by the Courts of Appeal. See, Roley v. Pierce County Fire Protection District #4, 869 F.2d. 491 (9th Cir. 1989) (charges of incompetence or inability to get along with others may reduce economic rewards but do not warrant constitutional procedural protection); Kelly Kare Ltd. v. O'Rourke, 930 F.2d 170 (2d Cir. 1991) (innuendo which may stem from a without cause termination of a public contract does not amount to a deprivation of a liberty interest); Brandt v. Board of Cooperative Educational Services, 820 F.2d 41 (2d Cir. 1987) (where the reasons for an employees

termination are kept private, the "public disclosure" requirement has not been met).

While charges of corruption in conjunction with the termination of a governmental benefit may implicate the due process clause of the 14th Amendment, the underlying facts of this case do not support this scenario. Petitioner's Complaint does not allege that any charges of wrongdoing were made in conjunction with his demotion but only that the Petitioner sought to schedule a news conference to publicly proclaim the absence of wrongdoing. (Appendix A-24a)

As set forth in the Petitioner's statement of the case, at the time of the Petitioner's demotion in March 1989, there were no charges of corruption or misconduct levied against him. To the contrary, the Mayor specifically refused to comment on the issue. The Petitioner's argument would essentially extend the protections of the Due Process Clause to all public employment decisions, even where no charges of misconduct, incompetence or otherwise are publicized.

As set forth by this Court in Codd v. Velger, 429 U.S. 624, 627, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977), where the liberty interest involved is a stigmatization of a non-tenured

employee in the course of the decision to terminate his employment, the hearing required by the Due Process Clause is solely "to provide the person an opportunity to clear his name." Where the employee does not have a property interest in his employment, the hearing need not address the adequacy or even the reasons for the decision to terminate him. In conformity with the decision in Bishop v. Wood, supra., there is necessarily no need or right to a hearing if the stigmatizing charges are not publicized since there is no need for the employee to clear his name. Since the underlying facts of this case cannot support the issue presented, the Petition for Writ of Certiorari on the basis of the due process question should be denied.

In addition, the merits of the Petitioner's contentions do not rise to the level to require review by the United States Supreme Court in any event. Rule 10 of the Rules of the Supreme Court of the United States, U.S. Sup. Ct. Rule 10, 28 U.S.C.A., provides that a Petition for Writ of Certiorari will be granted "only when there are special important reasons therefore". In support of the Petition, the Petitioner asserts that the decision of the Court of Appeals for the Third Circuit is not in accord with the applicable decisions of this Court. As a basis for this argument, the Petitioner

points to the case of Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). A thorough review of this decision reveals that there exists no inconsistency.

In Paul v. Davis, this Court provided an exhaustive review of its prior decisions concerning the liberty interest in order to resolve the question of whether an injury to reputation, standing alone, was enough to implicate the protections of the Due Process Clause of the 14th Amendment. In reaching its decision that a liberty interest was not implicated, the Court engaged in a two part analysis. First, the Court addressed the premise that the Due Process Clause of the 14th Amendment and 42 U.S.C. §1983 made federally actionable wrongs inflicted by the government which had previously been thought to constitute only state law tort claims. Since there is no specific constitutional guarantee protecting the interest of one's reputation, this argument was summarily rejected as an attempt to superimpose a body of federal tort law on systems already administered by the states. 424 U.S. at 701, 96 S.Ct. at 1160.

The second premise addressed by the Court - "that the infliction by state officials of a 'stigma' to one's reputation is somehow different in kind from infliction by state officials of harm

to other interests protected by state law" - was found to be equally untenable. 424 U.S. at 701, 96 S.Ct. at 1160. It is, however, on this issue that the Petitioner attempts to distinguish his case. After exhaustively reviewing the prior decisions in which a "liberty" or "property" interest were found under the Due Process Clause, the Court held

> "In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interests from the recognition of protection previously afforded by the State, which we found sufficient to envoke the procedural guarantees contained in the due process clause of the 14th Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in Federal Court is quite different from 'liberty' or 'property' recognized in those decisions."

424 U.S. at 711, 96 S.Ct. at 1165. The Petitioner points to the observation by the Court that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of Petitioner's actions", as support for the contention that Paul v. Davis would recognize a federal action for defamation where the state does extend to its citizens a legal guarantee of the right to his reputation, as found in

the Pennsylvania Constitution. Pa. Const. art. I, §1.

This reading of Paul v. Davis ignores the clear admonition that harm or injury to one's reputation interest does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change in status as theretofore recognized under the state law. 424 U.S. at 712, 96 S.Ct. at 1166. This Court specifically rejected the Petitioner's contention that the Due Process Clause of the 14th Amendment provides a federal tort remedy for every injury to reputation by a state officer. The Petitioner's interests in his reputation are protected to the same extent under the laws of the Commonwealth of Pennsylvania as they had been previously. The Respondent's actions have not altered that right or the protections provided by state law to a tort remedy.

To read Paul v. Davis any other way would grant residents of Pennsylvania unlimited recourse to federal actions not only in a defamation suits, but as to any infringement by the government on the right to happiness which is also granted under the Pennsylvania Constitution at Article I, Section 1. Not only is there no authority for such a result, the decisions of this Court explicitly refute this contention.

Finally, the Petitioner argues that the lower court erred in determining that the Petitioner did not have a "right or status" under state law which was altered or extinguished and contends that this holding strips at-will government employees of appropriate recourse against adverse employment actions. It is granted that this Court previously found that a right to government employment may be afforded due process protection where the employment has been terminated or there has been a refusal to rehire based upon charges or dishonesty or immorality. Board of Regents v. Roth, supra. In determining that there must be some alteration or extinguishment of the right or status accorded by state law, in conjunction with an allegedly defamatory publication, in order to obtain constitutional status, this Court noted in Paul v. Davis, supra. "certainly there is no suggestion in Roth to indicate that a hearing would be required each time the state in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee". 424 U.S. at 712, 96 S.Ct. at 1165.

There is no due process protection afforded to every government employee which would cover every employment decision. The liberty interests protected in this line of cases is the

right to government employment itself, not the right to a particular job with the government. This interest is recognized for at-will employees only in those situations where charges against an employee in conjunction with the

decision to terminate or not to rehire actually altered or extinguished the right to further employment with the government. Where the stigma attached to an allegation of misconduct results in foreclosure of other possibilities of government employment , a liberty interest in implicated. Similarly, the right to attend school in Ohio could not be infringed upon based on charges of misconduct without the procedural safeguards of the 14th Amendment, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) and the status of a parolee cannot be altered because of an alleged parole violation without due process. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 44 (1972). It is the extinguishment or alteration of the underlying right which is afforded due process protection.

In this case, the District Court found that there had been no extinguishment or alteration of the Petitioner's right to employment with the government. Since the Petitioner had no state guarantee in his position of police chief, the demotion to the

position of sergeant implicated neither a property or liberty interest. The Petitioner retained the right to government employment as evidenced by his demotion within the department, as well as his subsequent employment with the State Crimes Commission. This decision is consistent with other Third Circuit Court of Appeal decisions and Court of Appeal decisions in other Circuits. Clark v. Township of Falls, 890 F.2d 611 (3d Cir. 1989); Sturm v. Clark, 835 F.2d 1009 (3d Cir. 1987); Morrash v. Strobel, 842 F.2d 64 (4th Cir. 1987), as well as the United States Supreme Court decisions. As stated in Board of Regents v. Roth, supra, it would stretch the concept of a liberty interest too far "to suggest that a person is deprived of 'liberty' when he simply is not rehired at one job but remains as free as before to seek another." 408 U.S. at 575, 92 S.Ct. at 2708.

The decisions of the District Court and Third Circuit Court of Appeals in this case are consistent with prior decisions of this Court and the Petitioner has failed to set forth any other reason to grant a Writ of Certiorari in this issue.

SECTION II

THE ENTRY OF JUDGMENT IN FAVOR OF THE RESPONDENTS ON A MOTION FOR DIRECTED VERDICT ON THE PETITIONER'S FIRST AMENDMENT CLAIMS WAS IN COMPLIANCE WITH PRIOR DECISIONS OF THIS COURT.

The Petitioner has formulated this issue as an inquiry into whether the imposition of a "gag order" on a public employee by his employer may give rise to a cause of action for a violation of the employee's First Amendment rights. As stated, this appears to be a case where the plaintiff's case was dismissed for failure to state a claim. However, in this case, Petitioner's claims were not preliminarily dismissed but judgment was entered in favor of the Respondents on the Petitioner's First Amendment claim after the Petitioner had entered his case before the jury on a Motion for Directed Verdict by the Respondents. By Order dated January 18, 1991, which amended the Court's Memorandum Opinion on the Motion for Directive Verdict of the prior day, the District Court specifically addressed the issue of the sufficiency of the Petitioner's claims. First, the Court found that the Petitioner neither raised not

tried the issue of a First Amendment claim for the imposition of the "gag order". In his Pretrial Narrative Statement, the Petitioner's Response to Motion for Summary Judgment and in his case in chief, the Court found that the Petitioner raised only the claim of retaliatory discharge for the exercise of his First Amendment rights, and not the claim that the directive issued by the Mayor was a violation of his rights separate and apart from the discharge. Secondly, the Court found that even if the Petitioner had raised this issue, the Petitioner did not meet his burden of establishing that a violation existed. The question presented to this Court is not whether a cause of action could exist for violation of First Amendment rights under the scenario proposed by the Petitioner, but whether the lower court appropriately determined that the Petitioner had failed to meet his burden of proof. This issue is much more limited than that stated by the Petitioner.

It is acknowledged that a "public employee does not relinquish First Amendment rights to comment on matters of public interests by virtue of government employment." Connick v. Myers, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983). However, it has also been recognized that "the state has interests as an employer in regulating speech of its employees

that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). As a result, this Court has consistently required a balancing analysis to be performed between the interests of the employee in commenting on issues of public concern and the interests of the public employer in promoting the efficiency of its services. Id.

The District Court examined this issue in detail, even though the Court was of the view that the claim had not been raised or tried by the Petitioner. The Court found that the Petitioner's prohibited speech was not on a matter of public concern but that the evidence indicated only that the Petitioner intended to vindicate himself. As noted by this Court in Connick v. Meyers, supra.

> "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

461 U.S. at 147, 103 S.Ct. at 1690. The District Court's determination was totally in accord with this Court's prior dictates.

In addition, the District Court opined that even if Petitioner's speech was on a matter of public concern, the City's interests in protecting the orderly operation of the Police Department and City government outweighed those of the Petitioner. At trial, the Petitioner's own case established that the Petitioner himself had participated in drafting specific rules and regulations proscribing police officers' public commentary to the press and that the Petitioner was under severe restrictions, imposed by outside agencies, to speak on investigations within the community. The lower court correctly determined that the City's legitimate concern about Petitioner's public commentary on sensitive subjects and internal affairs, which were already affecting officer morale, clearly outweighed his desire for immediate vindication.

The Petitioner argues as an alternative basis that the alleged violation of his First Amendment rights serves as a basis to pursue his due process claim under Paul v. Davis, supra. This argument was not raised before either the District Court or the Third Circuit Court of Appeals and neither Court had an opportunity to pass on this issue. As such, it is an improper issue for review by this Court. City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In addition, as it is formu-

lated, the Petitioner's argument is unresponsive to the issue presented.

SECTION III

THE LOWER COURT APPROPRIATELY GRANTED THE MOTION FOR DIRECTED VERDICT WHERE THE PETITIONER FAILED TO ESTABLISH THAT THE PETITIONER'S PROTECTED CONDUCT WAS A MOTIVATING FACTOR IN HIS DEMOTION.

A public employee may have a claim under the First and Fourteenth Amendments of the United States Constitution "if the decision to terminate was made by reason of the exercise of constitutionally protected First Amendment freedoms." Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33L.Ed.2d 570 (1972). In order to determine whether First Amendment activity was a reason for an adverse employment decision this Court has set forth essentially a three part analysis. Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). First, a plaintiff must establish that he is engaged in protected First Amendment activity. Second, the plaintiff must demonstrate that the activity was a substantial or

motivating factor to the action taken against him. Lastly, the defendant may defeat the claim by proving that the same action would have been taken even in the absence of the protected activity. As recognized by this Court, it is not sufficient that the plaintiff only show that the protected conduct was a factor in the decision.

> "A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in the decision not to rehire, could place an employee in a better position in the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . .[I]t would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision - even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of his decision."

429 U.S. at 285 - 286, 97 S.Ct. at 575. The rule of causation implemented by this Court is intended to distinguish between "a result caused by a constitutional violation and one not so caused." Id.

In this case, at the conclusion of his case in chief, the District Court determined that the Petitioner had failed to support the claim that the decision to demote him was the result of any protected conduct on his part. The Court found that the evidence, even as presented by the Petitioner, established that the Mayor was motivated by factors other than insubordinate disclosure of the March 7 directive, factors which were communicated to members of City Council long before March 7. As recognized in the Court's Memorandum Opinion, virtually every witness called on behalf of the Petitioner testified about the animosity and ill will between the Petitioner and the Mayor and the Mayor's intentions to demote the Police Chief long before the alleged protective conduct occurred. The Petitioner argues that the insubordinate disclosure provided the Mayor the "excuse" needed to demote the Petitioner. This argument was rejected by the District Court, not only because the Mayor needed no excuse to demote an at will employee, but because the Petitioner presented no evidence that the Mayor

sought the approval of the Council or that the demotion "was any more satisfactory to Council members after the insubordination than before." (Appendix A-13a) If it was the Petitioner's contention that the disclosure of the March 7 directive was a motivating factor in the Mayor's decision to demote him because the Mayor wanted to avoid the pressure from the public and Council which accompanied the prior demotion, it was the Petitioner's burden to offer some evidence to support that theory.

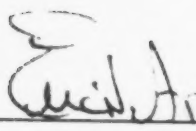
The Petitioner proposes that the District Court's decision will enable employers to utilize pretextual means to resolve employment decisions involving marginal candidates. However, a review of the District Court's decision reveals that the Petitioner was not a borderline or marginal candidate, in the eyes of the Mayor, the sole arbitrator in this case, and that the motivating reasons for the demotion were all factors which were afforded no constitutional protections. As an at will employee, the Petitioner could be demoted for no reason or any reason, except those that would infringe on his constitutional rights. The fact that the Petitioner's employment could be affected for reasons other than for "just cause" does not mean that an at will employee's protections under the First Amendment are in any way diminished.

Finally, Petitioner argues that the decision of this Court in Mount Healthy City School District v. Doyle, supra. requires the lower court to proceed through all three parts of the First Amendment analysis, and would require the employer in this case to present testimony as to the reasons for the Petitioner's demotion. This conclusion is not supported by a reading of the case, and would result in an undue waste of judicial resources in situations such as this. While an arguable First Amendment claim may require an employer to show that it would have reached the same decision even in the absence of the protected conduct, where a plaintiff provides all of the information necessary to determine whether there was a viable claim, the Court is within its discretion to grant a directed verdict. It is clear from the District Court's Memorandum Opinion that the Court found not only that the Petitioner had failed to show that the protected conduct was a substantial factor in the decision to demote the Petitioner, but that the Petitioner's case itself supported the determination that the demotion would have occurred even in the absence of the protected conduct. If this decision can be made on the basis of only the plaintiff's case, there is no requirement that the trial court continue to take testimony.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PETER N. STARR,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 89-53 Johnstown**
v.	)	
	)	
THE CITY OF ALTOONA,	)	
and ALAN R. MIKULA,	)	
MAYOR	)	
	)	
Defendants.	)	

ORDER

AND NOW, this 18th day of January, 1991, IT IS ORDERED that this court's memorandum opinion filed January 17, 1991, in the above case is AMENDED by the addition of footnote A at the end of the first full paragraph on page 2 of said opinion, which reads as follows:

A. Starr might have claimed that defendants violates his rights by the very imposition of the May 7, 1989, directive discussed infra. That directive, lasting only sixteen days, instructed Starr not to speak with the press, be photographed or

video-taped. Plaintiff, however, did not try or present the case on those grounds. As evidenced by his pre-trial narrative statement, his opposition to defendants' motion for summary judgment and his case in chief, plaintiff only addressed the constitutionality of the directive in the context of the retaliatory demotion claim; in other words, as the first prong of the Trotman test.

We do note however, that even though the directive may be characterized as a prior restraint, the analysis of whether the directive itself infringed upon Starr's First Amendment rights still concerns the relationship between the First Amendment and public employers, and such analysis is based upon the same principles as the first prong of Trotman. See Clark v. Township of Falls, 890 F.2d 611, 620-22 (3d Cir. 1989). Thus, whether the directive itself violated Starr's first amendment rights is a question of law for the court. Lees v. West Greene School Dist., 632 F.Supp. 1327 (WD Pa 1986); Johnson v. Lincoln University, 776 F.2d 443, 450 (3d Cir. 1985). In determining whether the directive was unconstitutional, the first inquiry is whether the prohibited speech was on a matter of public concern. Id.; Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138 (1983). Plaintiff introduced no evidence as to the public's concern

with the matters he would be speaking about. He was not about to criticize the police operation. He has not stated that he wanted to inform the public of improper actions by the Mayor. The only evidence suggests that he simply wanted to vindicate himself, and that is not necessarily a matter of public concern. Plaintiff's subjective intent is among the many factors guiding our determination. Schalk v. Gallemore, 906 F.2d 491 (10th Cir. 1990).

Furthermore, even if plaintiff would have spoken on a matter of public concern, we must next balance his desire to speak with the Mayor's need to protect orderly operation of government. Even if Starr's comments would have been on matters of public concern, we feel that the temporary directive, ordering Starr not to hold any press conferences or communicate with the press, did not unduly infringe upon his rights. The parties to this action are two of the highest ranking city officials; they commonly must keep silent about various developments. The police chief himself had a hand in writing speech-restricting regulations applicable to Altoona police officers. Given the Mayor's intention to demote Starr, it was entirely reasonable to prevent Starr from commenting on or compromising matter he may have had knowledge of as police chief. See Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990).

Finally, we question whether the relief Starr seeks - money damages - is proper. Rather than obeying a directive he thought illegal and then waiting to collect money for the damage to his reputation which could have continued indefinitely, it was probably incumbent upon Starr to either violate the directive or seek injunctive relief. Although Starr did seek to enjoin enforcement of the directive, that issue became moot when the directive was lifted on March 23, 1989.

/s/ Glenn E. Mencer
Glenn E. Mencer
United States District Judge